IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL APPLICATION(REVIEW) NO. 20 OF 2006

1. Shri Babani Raia Gaude,
   alias Gaokar, since deceased,
   by his legal representatives:
   1 a). Smt. Chanar Babani Gaude
   alias Gaokar,
   1 b) Shri Prakash Babani Gaude,
   1 c) Shri Vishwanath Babani Gaude,
   1 d) Miss Mangal Babani Gaude,
   All residing at Sanwarbhat,
   Borim, Ponda, Goa.

2. Shri Fondu Vassu Gaude alias
   Gaokar, since deceased by his
   legal representatives:
   2 a) Smt. Paru Fondu Gaude,
   2 b) Shri Gurudas Fondu Gaude,
   2 c) Shri Gajanan Fondu Gaude,
   2 d) Shri Narayan Fondu Gaude,
   2 e) Shri Gokuldas Fondu Gaude,
   2 f) Miss Shakuntala Fondu Gaude,
   2 g) Miss Namu Fondu Gaude,

3. Shri Deu Rupo Gaude alias Gaokar,
   since deceased, by his legal
   representatives:
   3 a) Shri Shantaram Deu Gaude,
   3 b) Shri Krishna Deu Gaude,

4. Shri Anant Govind Gaude alias
   Gaokar.

5. Shri Hari Shambhu Gaude alias
   Gaonkar.

6. Shri Bhisso Dugu Gaude alias
   Gaokar, since deceased by his
   legal representatives:

6 a) Smt. Kesar Bhisso Gaude,
6 b) Shri Vishnu Bhisso Gaude,
6 c) Smt. Nutan Vishnu Gaude,
6 d) Shri Dayanand Bhisso Gaude,
6 e) Smt. Geeta Dayanand Gaude,
6 f) Shri Satyawan Bhisso Gaude,
All residing at Sanwarbhat,
Borim, Ponda, Goa.
6 g) Smt. Ahilya Shrikant Gaokar,
6 h) Shri Shrikant Savlo Gaokar,
both residing at Wadi,
Talauli, Ponda, Goa.
6 j) Shri Shaba Gaokar
both residing at Cuncolim,
Salcete, Goa.

7. Shri Shrikant Ram Gaude
alias Gaokar, residing at
Sanwarbhat, Borim,
Ponda, Goa. ... Applicants

versus

Shri Umakant R. Sawkar,
Resident of Borim,
Ponda, Goa,
Since deceased, by his
Legal representatives:
a) Smt. Manorama Umakant Sawkar,
b) Miss Hema Umakant Sawkar,
c) Miss Seema Umakant Sawkar,
d) Miss Swamini Umakant Sawkar,
All residing at Xirxirem,
Borim, Ponda, Goa. ... Respondents

Mr. S. D. Lotlikar, Senior Counsel with Mr. M. B. D'Souza, Advocate for the Applicants.

Ms. S. Linhares, Advocate for the Respondents.

CORAM : N. A. BRITTO, J.

DATE : 9TH FEBRUARY, 2007.

ORAL ORDER

This is a review petition, for review of the Judgment of this Court dated 23-9-2005, by which the Judgment/Order of the first appellate Court dated 30-8-1997 was set aside and that of the learned trial Court dated 20-3-1990 was restored.

2. Heard the learned Senior Counsel Mr. S. D. Lotlikar and the learned Counsel Ms. S. Linhares on behalf of both the parties.

3. The contention raised is that respondent no. 4 Shri Anant Govind Gaude alias Gaokar had died during the pendency of the said second appeal before this Court and the said respondent no.4 has left behind two sons and four daughters besides the widow Chandrabhagem and since the said legal representatives were not brought on record, the second appeal was abated as a whole and could not have been decided on merits of the case since there was a joint decree in

favour of respondent no.4 along with the other respondents in the said second appeal.

4. In my view, the contention raised has got to be rejected for more reasons than one. There can be no doubt that in terms of Order 47, Rule 1 C.P.C. an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason, as stated by the Apex Court in the case of **Board of Control for Cricket, India and another** v. **Netaji Cricket Club and others**(AIR 2005 SC 592) on which reliance has been placed by the learned Senior Counsel. However, in my view, abatement cannot be considered to be an error apparent on the face of record or any other sufficient reason, for review of the Judgment, as contemplated by Order 47, Rule 1 C.P.C. In fact, no authority has been cited on behalf of the appellants to support a contrary proposition and in my view, there could be none. The remedy for the appellants if at all available appears to be elsewhere and not by way of invoking review jurisdiction.

5. Secondly, it has been contended on behalf of the respondents and, in my view rightly, that a suit for permanent injunction simpliciter does not abate upon the death of one of the defendants and if upon his death, legal representatives are not brought on record. If any authority is required to support such a proposition reference could be made to the case of **Murti Hanuman Brajman Hanuman Mandir, Hissar and others** v. **Punjab Walkaf Board and others**(AIR 1984 Punjab and Haryana 239) reliance on which has been placed on behalf of the respondents and wherein it has been held that in a suit for the grant of permanent injunction, the right to sue survives even if one of the defendants has died and his legal representatives are not brought on record and the suit does not abate as a whole because of the death of one of the defendants. The authorities cited and reported in 2001(5) SCC 570, 2003(10) SCC 631, 2006 (6) SCC 569, 98(4) ALL MR 173 and 1997(1) GLT 188 do not lay down any contrary proposition.

6. Thirdly, on behalf of the respondents, it is stated that they did not know at any point of time about the death of respondent no.4 Anant Govind Gaude alias Gaokar. On behalf of the

respondents, it is also stated that respondent no.4 was always being represented by learned Counsel Ms. S. Naik and learned Senior Counsel Mr. S. D. Lotlikar and since the learned Counsel appearing on behalf of respondent no.4 did not inform the death of respondent no.4 to the Court in terms of Order 22, Rule 10A C.P.C. the appellants ought not to be allowed to take advantage of their own wrong. On behalf of the appellants, it is stated that it was respondent no.4 who was looking after the subject matter on behalf of himself and other respondents in the said appeal and after his death the contact with the respondents was lost with the Advocate/s appearing on behalf of the respondents so much so that the appellants were not even aware of the disposal of the second appeal by this Court by Judgment dated 27-9-2005 about which they came to know only in the first week of April, 2006. Controversy such as this has been set at a rest by the Apex Court in **P. Jesaya** v. **Sub Collector** ((2004) 13 SCC 431). In case the learned Counsel of the respondents had lost contact with the respondents or any one of them, they ought to have taken steps either to establish the contact or to withdraw their appearance. In the aforesaid case, the Apex Court has held that it was obligatory on the pleader of

the deceased to inform the Court and the other side about the factum of death of a party. The Supreme Court noted that the Counsel appearing on behalf of the deceased was present and had argued the matter and further observed that it was clear that the attempt was to see whether a favourable order could be obtained and only after the order went against them that they made an attempt for having that order set aside and that was in fact an attempt to take not just the other side but also the Court for a ride and such attempts are not to be allowed to prevail from whatever angle one looks at. The same deserves to be rejected. This decision is clearly applicable to the facts of this case.

7. Review Petition is hereby dismissed with costs to the respondents.

N. A. BRITTO, J.

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